GLYNN & FINLEY, LLP
ROBERT C. PHELPS, Bar No. 106666
One Walnut Creek Center
100 Pringle Avenue, Suite 500
Walnut Creek, CA 94596
Telephone: (925) 210-2800
Facsimile: (925) 945-1975
bphelps@glynnfinley.com

Attorneys for Defendant
Chevron U.S.A. Inc.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

TRANSBAY AUTO SERVICE, INC., a California corporation, Plaintiff, vs. CHEVRON U.S.A. CORPORATION, a Delaware corporation, CHEVRON U.S.A. INC., a Delaware corporation, and DOES 1 through 10, Inclusive, Defendants.	**Case No. CV 09-4932 SI** **MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFF'S MOTION FOR (1) EXEMPLARY DAMAGES; (2) ATTORNEYS' FEES; AND (3) PRE-JUDGMENT INTEREST** Date: January 25, 2013 Time: 9:00 a.m. Courtroom: 10, 19th Floor Judge: Hon. Susan Illston

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. ARGUMENT 2

A. Plaintiff's Demand for Exemplary Damages Should Be Rejected 2

1. The purpose of the PMPA exemplary damages provision would not be served by an award in this case 2

2. No facts support a claim for exemplary damages 3

B. Plaintiff's Request for Attorneys' Fees Should Be Denied or Substantially Reduced 5

1. Plaintiff's application does not comply with Local Rule 54-5 5

2. Plaintiff has not met its burden of proof in establishing the "lodestar" hourly rate 6

3. Plaintiff has not met its burden of proving that the hours claimed were reasonably devoted to this action 7

a) Plaintiff's application is replete with incomprehensible time entries 8

b) Pre-litigation activities should not be reimbursed 9

c) Plaintiff's application seeks reimbursement for over-billing 9

d) Plaintiff's request for reimbursement for counsel's travel time should be denied or substantially reduced 11

e) Plaintiff's request for reimbursement of office overhead expenses should be denied 12

C. Plaintiff's Request For A Multiplier Must Be Denied 13

1. Complexity of issue cannot be used to support an enhancement because that factor is subsumed in the lodestar 14

2. "Results obtained" cannot support an enhancement 14

3. Enhancement based on the contingent nature of the relationship between Plaintiff and its counsel is expressly forbidden by federal law 15

4. No evidence supports that Chevron U.S.A. employed "scorched earth tactics," or that Chevron U.S.A.'s conduct in any way supports an enhancement 15

TABLE OF CONTENTS
Continued

D. Plaintiff's Request for Enhanced Pre-Judgment Interest Should Be Denied.........16

1. Federal law governs award of interest in federal question cases.....................16

2. Basing interest rates on state law rules thwarts the PMPA's goal of national uniformity 17

3. The jury rejected Plaintiff's claim that it was harmed by alleged "excess" interest payments on his loan 17

III. CONCLUSION..18

TABLE OF AUTHORITIES

CASES

Accord: Van Gerwen v. Guarantee Mut. Life Co.
214 F.3d 1041 (9th Cir.2000) 13

Atlantic Richfield Co. v. Herbert (In re Herbert)
806 F.2d 889 (9th Cir.1986) 17

Blum v. Stenson
465 U.S. 886 (1984).. 6, 7, 14

Camacho v. Bridgeport Financial, Inc.
523 F.3d 973 (9th Cir. 2008) 7

Chalmers v. City of Los Angeles
796 F.2d 1205 (9th Cir. 1986) 12

Christensen v. Stevedoring Services of America
557 F.3d 1049 (9th Cir. 2009) 7

City of Burlington v. Dague
505 U.S. 557 (1992).. 6, 14, 15

Graham Oil v. Arco Products Co.
43 F.3d 1244 (9th Cir. 1994) 2, 5

Guam Soc'y of Obstetricians & Gynecologists v. Ada
100 F.3d 691 (9th Cir.1996) 13

Hensley v. Eckerhart
461 U.S. 424 (1983).. 7, 8

In re Kuhn
337 B.R. 668 (Bankr. N. D. Ind. 2006).. 11

Mac's Shell Service, Inc. v. Shell Oil Products Co., LLC
___ U.S. ___, 130 S.Ct. 1251 (2010).. 3

Mitchell Engineering v. City and County of San Francisco
2011 WL 1431511 (N.D. Cal. 2011) 8, 13, 14

Moreno v. City of Sacramento
534 F.3d 1106 (9th Cir. 2008) 7

Oak Harbor Freight Lines, Inc. v. Sears Roebuck & Co.
513 F.3d 949 (9th Cir. 2008) 17

Pennsylvania v. Delaware Valley Citizens' Council for Clean Air
478 U.S. 546 (1986).. 6, 7, 14

TABLE OF AUTHORITIES
Continued

Perdue v. Kenny A. ex rel. Winn
___ U.S. ___, ___, 130 S.Ct. 1662 (2010) 13, 14, 15, 16

Straw v. Bowen
866 F.2d 1167 (9th Cir. 1989) 7

Svela v. Union Oil Company of California
807 F.2d 1494 (9th Cir. 1987) 3

Welch v. Metropolitan Life Ins. Co.
480 F.3d 942 (9th Cir. 2007) 6, 8

STATUTES

15 United States Code (U.S.C.)
Section 2801, *et seq.* 1
Section 2805 .... 1, 2
Section 2805(b)(2)(a)(ii) 3

28 United States Code (U.S.C.)
Section 1961 16

OTHER AUTHORITIES

Delaware Local Bankruptcy Rule 2016-2(d)(viii) 11

Northern District of California Civil Local Rules
L.R. 54-5 1
L.R. 54-5(b)(2) 7
L.R. 54-5(b)(3) 5, 6

S. Rep. 95-731, S. Rep. No. 731, 95th Cong., 2nd Sess. 1978,
1978 U.S.C.C.A.N. 873, 877, 1978 WL 8740, ... 2, 3

MISCELLANEOUS

Article, "Law Firms Face Fresh Backlash Over Fees"
(*The Wall Street Journal*, October 12, 2012) 11

Defendant, CHEVRON U.S.A. INC. ("Chevron U.S.A."), submits this memorandum in opposition to Plaintiff TRANSBAY AUTO SERVICE, INC.'s motion for exemplary damages, attorneys fees and prejudgment interest under the Petroleum Marketing Practices Act ("PMPA"), 15 U.S.C. §§ 2801 *et seq*.

I. INTRODUCTION.

This case asked whether Chevron U.S.A., in selling a service station property to Plaintiff, sold the premises at a figure that approached the premises' "fair market value." Chevron U.S.A. based the sales price on an independent appraisal. The jury ruled in Plaintiff's favor, but only awarded Plaintiff a fraction of the damages it sought.

Plaintiff now seeks exemplary damages, but without providing any legal support for the claim. While 15 U.S.C. § 2805 contemplates the possibility of the Court awarding exemplary damages, this is not an appropriate case for such an award. Chevron U.S.A. acted properly in all of its dealings with Plaintiff. The parties' only disagreement was as to the price at which Chevron U.S.A. offered to sell the property to Plaintiff. Plaintiff offers no authority holding that such a disagreement, standing alone, can warrant imposing exemplary damages. *See* pp. 2-5, *post*.

Plaintiff also seeks an award of its attorneys' fees and costs. But Plaintiff's application falls woefully short of the standards established by case law and this Court's Local Rule 54-5. The application is also marred by incomprehensible time entries, over billing and billing for items that are at best recoverable only at a steeply discounted rate. *See* pp. 5-12, *post*.

Plaintiff's request for a multiplier must also be rejected. Plaintiff has not proved that this is a "rare" or "exceptional" case warranting a multiplier. Moreover, Plaintiff bases its claim for a multiplier on factors that the U.S. Supreme Court has expressly prohibited district courts from applying in considering multipliers. *See* pp. 12-16, *post*.

Finally, the Court should reject Plaintiff's contention that the Court should ignore federal law in this federal question case and apply state law to determine prejudgment interest in this case. *See* pp. 16-18, *post*.

/ / /

II. ARGUMENT.

A. Plaintiff's Demand for Exemplary Damages Should Be Rejected.

Under 15 U.S.C. § 2805, the Court has the authority to award exemplary damages in the appropriate case under the PMPA. Other than citing the statute, Plaintiff's argument provides no legal authority whatsoever discussing the propriety of awarding punitive damages under the PMPA. Indeed, our research has not uncovered a single reported case under the PMPA where exemplary damages were awarded. This case should not be the first.

1. The purpose of the PMPA exemplary damages provision would not be served by an award in this case.

The law regarding exemplary damages under the PMPA is not well-developed. However, in *Graham Oil v. Arco Products Co.*, 43 F.3d 1244 (9th Cir. 1994), the Ninth Circuit discussed the purpose of each of the PMPA's damages provisions. The issue in *Graham Oil* was whether Arco could require its franchisees by contract to waive PMPA rights, including the right to exemplary damages. The Ninth Circuit explained the statutory purpose behind the PMPA's exemplary damages provision:

> "The purpose of exemplary damages [under the PMPA] is to deter franchisors from engaging in improper terminations of franchise agreements.

43 F.3d at p. 1248.[1]

Here, there was no claim at trial that the termination of Plaintiff's franchise with Chevron U.S.A. was improper. Rather, the only question at trial was whether—once the decision to terminate had been made—Chevron U.S.A. offered to sell the premises to Plaintiff for an amount that approached the premises' fair market value. *See, e.g.*, Dkt. No. 131 (Verdict Form); Pltf's Mem., p. 2 (issue in case was whether a "bona fide" offer was made by Chevron U.S.A.). Chevron U.S.A.'s witnesses (Messrs. Vaughn and Loyd) testified that the decision to terminate the Transbay franchise was made as part of Chevron U.S.A.'s general decision making processes. Transbay was not singled out or subjected to retaliation and Plaintiff never argued to the contrary.[2]

---

[1] The PMPA's legislative history is unhelpful in determining the standards the Court should apply in determining whether to award exemplary damages. The Senate Report accompanying the original passage of 15 U.S.C. § 2805 in 1978, states only that "[a]ctual damages, exemplary damages under certain circumstances, and reasonable attorney and expert witness fees are authorized." S. Rep. 95-731, S. Rep. No. 731, 95th Cong., 2nd Sess. 1978, 1978 U.S.C.C.A.N. 873, 899, 1978 WL 8740, *41.

If Plaintiff believed the original non-renewal of its franchise was improper, it could have sought and obtained a preliminary injunction halting the non-renewal under the PMPA's special injunction provision. *See* 15 U.S.C. § 2805(b)(2)(a)(ii). As the Supreme Court has explained, franchisees can easily obtain injunctive relief under the PMPA, since the law allows a franchisee "with anything close to a meritorious claim to obtain relief." *Mac's Shell Service, Inc. v. Shell Oil Products Co., LLC*, ___ U.S. ___, 130 S.Ct. 1251, 1263, n. 12 (2010). Plaintiff's experienced PMPA counsel never sought such relief.

Ultimately, the Court is *not* empowered by the PMPA to punish Chevron U.S.A. by second-guessing Chevron U.S.A.'s routine marketing decision to sell the premises. Indeed, the Senate Report accompanying the passage of the PMPA makes clear that PMPA is designed to "recognize the importance of providing adequate flexibility so that franchisors may initiate changes in their marketing activities to respond to changing market conditions and consumer preferences." S. Rep. 95-731, S. Rep. No. 731, 95th Cong., 2nd Sess. 1978, 1978 U.S.C.C.A.N. 873, 877, 1978 WL 8740, *19. Under long-settled Ninth Circuit precedent, the PMPA "preclude[s] judicial second-guessing of the economic decisions of franchisors." *Svela v. Union Oil Company of California*, 807 F.2d 1494, 1501 (9th Cir. 1987).

2. No facts support a claim for exemplary damages.

Plaintiff's argument in favor of exemplary damages simply rehashes Plaintiff's closing argument to the jury on the merits. The sole conduct, however, on which Plaintiff bases its claim for exemplary damages is the following:

/ / /

/ / /

---

[2] Chevron U.S.A. also kept Plaintiff fully advised of its plan to sell the service station property and even went so far as to tell Mr. Tsachres before he bought the business that Chevron U.S.A. expected to sell the property in the near term. *See* Stipulated Fact Nos. 6-9, Dkt No. 73, pp. 5-6.

> "Transbay submits that Chevron U.S.A.'s refusal to reduce the purchase price to take the ordinance into effect was willful and justifies an award of punitive damages."

Pltf's Mem., p. 4:16-17.

But this argument again simply conflates Plaintiff's argument on the merits with its argument for exemplary damages. Plaintiff argued that the jury should award damages to Transbay because the price offered was not "bona fide." And Plaintiff argued that the price offered was not "bona fide" because it did not consider the effect of the San Francisco service station Ordinance. PMPA case law has consistently recognized that an offer to sell may be "bona fide" under the PMPA even if the parties disagree on the exact offering price. In other words, there is no absolute, magical "market value" the offer must meet. An offer is "bona fide" if it "approach[es] fair market value" of the property.[3] Since the law recognizes that "a range of prices may reasonably 'approach fair market value,'"[4] it would be perverse in the extreme to hold that a disagreement as to price warrants exemplary damages.

Moreover, Chevron U.S.A.'s actions were reasonable. It based its price to plaintiff on an appraisal conducted by a disinterested third-party. Pltf's Mem., pp. 3-4; Exh. 114 (Deloitte Appraisal) That Plaintiff produced a different appraisal *after the transaction closed* and raised for the first time the possible effect of the San Francisco Ordinance can hardly be used to punish Chevron U.S.A.'s actions *before* the deal closed.[5]

The reasonableness of Chevron U.S.A.'s actions in not "reduc[ing] the purchase price to take the ordinance into effect" was confirmed by Plaintiff's own experts. As discussed more fully in Chevron U.S.A.'s Rule 50 JMOL motion, served and filed herewith, Plaintiff's own experts testified that it would be impossible for Chevron U.S.A. to "reduce the purchase price to take the ordinance into effect" because it is impossible in their view to quantify the effect of the

---

[3] *See* Jury Instructions (Determining A "Bona Fide Offer"), Dkt. No. 127, p. 7.

[4] *See id.* (Fair Market Value).

[5] The transaction closed on November 18, 2008. *See* Stipulated Fact No. 19, Dkt. No. 73, p. 6. The Plaine appraisal on which Plaintiff based its case was not conducted until January 2009. *See* Exh. 112 (Plaine Appraisal).

Ordinance, standing alone. For example, Mr. Junius, Plaintiff's real estate expert, testified at deposition (and the testimony was read to the jury) as follows:

> "Q. Have you made any study or any estimate as to how much the value of the property was reduced solely because of the San Francisco ordinance?
>
> "A. No. ***And I think that would be impossible to calculate.***"

Junius, p. 26:3-14 (Dkt. No. 141) (quoting Junius Dep., p. 63) (emphasis added).

In sum, an award of punitive or exemplary damages is not supported by the facts and would not serve the purposes of the PMPA, as defined by the Ninth Circuit in *Graham Oil*, *supra*. The request should be denied.

B. Plaintiff's Request for Attorneys' Fees Should Be Denied or Substantially Reduced.

Plaintiff's counsel also seek attorneys' fees costs. Plaintiff's counsel seek a "lodestar" amount of $207,227. Pltf's Mem., p. 10. On top of that, Plaintiff's counsel request a two-fold multiplier or enhancement. Id., p. 11. As set forth below, Plaintiff's counsel's fee application fails in its proof, and seeks recovery on grounds expressly forbidden by law.

1. Plaintiff's application does not comply with Local Rule 54-5.

We begin by noting that Plaintiff's fee request fails at the threshold because it does not comply with Civil Local Rule 54-5(b)(3). That Rule requires that a party seeking a fee award must submit:

> "A brief description of relevant qualifications and experience and a statement of the customary hourly charges of each such person or of comparable prevailing hourly rates or other indication of value of the services."

Here, Plaintiff's fee application is supported by the declaration of Martin Fox, Esq., one of Plaintiff's lawyers (Dkt. No. 138). But Mr. Fox's declaration is incomplete. He discusses the qualifications of himself, Mr. Tom Bleau, and Plaintiff's lead trial counsel, Mr. Rees (Mr. Rees's resume is also attached). Fox Decl., ¶¶ 4-9. But Mr. Fox's declaration says nothing about the qualifications of several other timekeepers for whose work Plaintiff seeks reimbursement. Plaintiff's time records, attached as Exhibit A to Mr. Fox's declaration, show time entries by individuals with the following initials: TPB, GLL, MC, MJR, MRF, JR, STR and RAA. We assume that "TPB" is Mr. Bleau; "MRF" is Mr. Fox and "STR" is Mr. Rees. We also assume that "GLL" is Gennady Lebedev and "MC" is Megan Childress (both of whom appeared as counsel for plaintiff at various times).

The fee application fails at the threshold under Civil L.R. 54-5(b)(3) because there is no summary of the qualifications of Mr. Lebedev and Ms. Childress, or of the timekeepers identified only as "MJR," "RAA" and "JR.". In the absence of evidence of their qualifications, the Court has no basis for judging the reasonableness of the hourly rates charged by those individuals.

2. Plaintiff has not met its burden of proof in establishing the "lodestar" hourly rate.

Federal law follows the well-known "lodestar" approach in determining fee awards under federal fee-shifting statutes. The "lodestar" is simply "the product of reasonable hours times a reasonable rate." *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565 (1986). While federal fee-shifting laws may vary in detail, the Supreme Court has made clear that "our case law construing what is a 'reasonable' fee applies uniformly to all of them." *City of Burlington v. Dague*, 505 U.S. 557, 562 (1992).

The party seeking the fee award has the burden of establishing the lodestar:

> "[C]ourts properly have required prevailing attorneys to justify the reasonableness of the requested rate or rates. To inform and assist the court in the exercise of its discretion, the burden is on the fee applicant to produce satisfactory evidence—***in addition to the attorney's own affidavits***—that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation. A rate determined in this way is normally deemed to be reasonable, and is referred to-for convenience-as the prevailing market rate."

Blum v. Stenson, 465 U.S. 886, 895 n. 11 (emphasis supplied); *see also Welch v. Metropolitan Life Ins. Co.*, 480 F.3d 942, 945-946 (9th Cir. 2007) ("The party seeking fees bears the burden of documenting the hours expended in the litigation and must submit evidence supporting those hours and the rates claimed").

/ / /

Plaintiff's application here fails the *Blum v. Stenson* test, because it is supported solely by the declaration of Plaintiff's counsel, Mr. Fox. *Blum v. Stenson* unambiguously requires that evidence "in addition to the attorney's own affidavits" is required.[6]

Plaintiff's application independently fails because, as noted above, Plaintiff has supplied *nothing* to justify the rates and qualifications for several timekeepers, including two (Mr. Lebedev and Ms. Childress) who apparently performed the lion's share of the pre-trial work in this case.[7] Notably, Mr. Lebedev billed at the highest rate claimed by Plaintiff for any of its attorneys, including Plaintiff's trial counsel, Mr. Rees (both billed at $350/hour). The work of Mr. Lebedev and Ms. Childress accounts for slightly more than half of the total fees claimed. They were responsible for 368.80 hours (out of a total of 649.75 hours claimed) and $103,700 (out of a total of $201,879.25 claimed).

3. Plaintiff has not met its burden of proving that the hours claimed were reasonably devoted to this action.

The second half of the lodestar calculation requires the Court to determine the number of hours reasonably expended on the matter. *E.g., Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, supra*. It is again axiomatic that Plaintiff has the burden to provide documentation showing that the hours for which it seeks reimbursement were reasonably incurred in the prosecution of this case. *Hensley v. Eckerhart*, 461 U.S. 424, 431 (1983); *Moreno v. City of Sacramento*, 534 F.3d 1106, 1111 (9th Cir. 2008); *see also* Civil L.R. 54-5(b)(2). As Justice Burger explained in his concurrence in *Hensley*:

---

[6] Ninth Circuit authority is in accord that evidence in addition to the attorneys' own affidavits is required to support the application. *See, e.g., Christensen v. Stevedoring Services of America*, 557 F.3d 1049, 1053 (9th Cir. 2009); *Camacho v. Bridgeport Financial, Inc.*, 523 F.3d 973, 980 (9th Cir. 2008); *Straw v. Bowen*, 866 F.2d 1167, 1169 (9th Cir. 1989).

[7] We do not contest the qualifications of Mr. Rees, Plaintiff's trial counsel. It is worth noting, however, that Plaintiff's employment of Mr. Rees as trial counsel undercuts Plaintiff's counsel's contention that this case required specialized experience with the PMPA. Pltf's Mem., p. 8. There is no proof that Mr. Rees ever handled a PMPA case before this one. *See* Fox Decl., Exh. D (Rees résumé). And while Mr. Fox stated that Mr. Rees was experienced in appraisal cases (Fox Decl., ¶ 9), such expertise is curiously missing from Mr. Rees's résumé.

> "[T]he party who seeks payment must keep records in sufficient detail that a neutral judge can make a fair evaluation of the time expended, the nature and need for the service, and the reasonable fee to be allowed"

461 U.S. at p. 437.

Unfortunately, however, Plaintiff's billing statements are filled with time entries that are either incomprehensible or which give the Court (and Chevron U.S.A.) no way to determine that work was actually and necessarily done for this matter. When confronted with inadequate proof, "the district court may exclude from the fee request any hours that are 'excessive, redundant, or otherwise unnecessary.'" *Welch v. Metropolitan Life, supra, quoting Hensley v. Eckhart, supra*, 461 U.S. at p. 434. *See also Mitchell Engineering v. City and County of San Francisco*, 2011 WL 1431511, at p. *2 (N.D. Cal. 2011) (Illston, J.). Accordingly, the Court should deny Plaintiff's request for compensation of the items detailed below. For the Court's convenience, we have grouped the challenged time entries according to the general nature of Chevron U.S.A.'s objections.

a) Plaintiff's application is replete with incomprehensible time entries.

Several of Plaintiff's Counsel's time entries are comprised of shorthand and abbreviations or are otherwise simply incomprehensible. Other are so brief (*e.g.*, "Research") that they do not give the Court or Chevron U.S.A. any basis for determining that the time was reasonably spent. Finally, still others are problematic because the description of the work done is non-descriptive (*e.g.*, the use of "etc." to describe work purportedly done).

The challenged time entries are summarized in Exhibit G to the Phelps Declaration. For example, Plaintiff's billing records include the following cryptic entries:

- April 2, 2010: "fu settlement brief, s/w MC" (1 hour claimed)
- August 5, 2010: "S?W MC, re discovery, fu" (1 hour claimed)
- September 7, 2010: "S/W MC, prep, fu" (0.50 hours claimed)
- November 29, 2010: "S/W MC, fu trial docs" (0.60 hours claimed)
- December 7, 2010: "Research" (0.33 hours claimed)

- December 7, 2010: "Trial prep, PTCS, etc." (same day and timekeeper as prior entry; 10.0 hours claimed).

Chevron U.S.A. submits that the Court should deduct a total of **28.38 hours** (or **$7,905.00**) from the fee application due to the incomprehensible time entries.

b) Pre-litigation activities should not be reimbursed.

Plaintiff's original complaint was filed on October 16, 2009 (Dkt. No. 1). The time entries for which Plaintiff's counsel seek reimbursement, however, begin *more than a year earlier*, in late September, 2008. Fox Decl., Exh. A. There is no mention of a lawsuit in the time entries until more than a *year* later, on October 15, 2009. *Id.*[8]

None of Plaintiff's counsel's time entries prior to October 15, 2009 give the Court any indication of what work Plaintiff's counsel were doing. Vague references to email and phone calls tell the Court nothing. To the contrary, some entries suggest on their face that Counsel were performing non-recoverable work. For example, reference to time spent reviewing "environmental reports" suggests that work unrelated to the PMPA claim was being done, as there was no environmental issue in this case. *See* Fox Decl., Exh. A (Time entry for October 30, 2008).

Plaintiff has the burden of proving that the work was necessarily done in the prosecution of Plaintiff's claim that Chevron U.S.A. violated the PMPA. *See* p. 8, *supra*. Plaintiff has failed to do so. Accordingly, we submit that the Court should disallow pre-litigation activities and deduct **14.45 hours** (or **$5,057.50**) from the lodestar, representing time entries prior to October 15, 2009. *See* Phelps Decl., ¶ 4, Exh. H.

c) Plaintiff's application seeks reimbursement for over-billing.

Next, we note that Plaintiff's billing records contain examples of obvious over billing. The challenged time entries are summarized in Exhibit I to the Phelps Declaration. For example:

/ / /

[8] That first reference is a 5.0 hour time entry by "MJR" on October 15, 2009. Fox Decl., Exh. A. As noted above, "MJR" is one of the timekeepers whose identity and qualifications Plaintiff has not provided to the Court. *See* p. 6, *supra*.

- Counsel billed 12.0 hours on August 26, 2010 for "PMK Depo (Northern California)." While a "person most knowledgeable" deposition was held on August 26, 2010, the deposition transcript shows that the deposition began at 10:50 a.m. and ended at 2:45 p.m. In other words, Plaintiff's counsel billed 12.0 hours for a roughly four hour deposition. Phelps Decl., ¶ 3, Exh. D.
- Similarly, counsel billed 16.0 hours on September 14, 2010 for "Travel to Oakland and back, attend depo." The sole deposition Plaintiff's counsel took on that date (of Mr. Loyd) began at 1:09 p.m. and ended at 2:48 p.m. Counsel also separately billed 4.0 hours on September 13, 2010 to prepare for the deposition. Even if the Court were to allow Plaintiff's counsel to recover for travel time, 14.0 hours to travel from Southern California to Northern California for a 2 hour deposition is excessive. Phelps Decl., ¶ 3, Exh. E.
- On September 13, 2010, counsel billed 2.50 hours to "Prep for PMK depos." However, the only "PMK" deposition in this case was taken on August 26, 2010, some 2+ weeks before the "prep time" was allegedly incurred. Deposition "preparation" time charged for a deposition that already took place cannot be reasonable. Phelps Decl., ¶ 3, Exh. D.
- Finally, on May 11, 2011, Plaintiff's counsel (Mr. Fox) billed 8.20 hours to "Attend and argue at Pre-Trial Conference." The official transcript of the Pre-Trial Conference conducted that day shows that the conference lasted less than one hour, beginning at 3:30 p.m. and ending at 4:25 p.m. Phelps Decl., ¶ 3, Exh. F. Even if we assume that the remainder of the time claimed for this entry is travel time, billing 7+ hours for a hearing that lasted less than an hour is excessive. We also note that when the Court held other conferences, Plaintiff's counsel appeared by phone.

Chevron U.S.A. submits that the Court should deduct a total of **37.50 hours** (or **$12,945.00**) from the fee application due to over billing. To the extent Plaintiff's counsel contend that the additional hours claimed beyond the depositions and hearings attended represent travel time, we address that below.

/ / /

/ / /

d) Plaintiff's request for reimbursement for counsel's travel time should be denied or substantially reduced.

A large portion of Plaintiff's application consists of travel time. Chevron U.S.A. submits that the travel time incurred by Plaintiff's counsel should be denied, or at least substantially reduced.[9]

We recognize that Plaintiff is free to select the counsel of its choice. However, that choice to employ non-local counsel does not automatically mean that Chevron U.S.A. is responsible for all of the hours Plaintiff's counsel spent commuting. A quick search of PMPA cases reported from the Northern District of California reveals that there are several competent PMPA lawyers in Northern California. Indeed, in prior PMPA litigation, Transbay was represented by Richard Perez, Esq., an attorney from the East Bay. *See* docket in case No. 06-00534-CRB.

While lawyers in the past routinely billed their clients for travel expenses, that is no longer the norm in the 2012 legal market. Plaintiff has submitted no evidence that billing clients for pure travel time is still acceptable. *The Wall Street Journal* reported that "many clients no longer permit attorneys to charge their full hourly rate for travel time" in an October 12, 2012 article titled "Law Firms Face Fresh Backlash Over Fees". Phelps Decl., ¶ 5, Exh. L. This trend has been recognized by several bankruptcy courts, which have limited pure travel time reimbursement (*i.e.*, where no work was done in transit) to no more than 50% of the attorney's regular rate. *E.g.*, Delaware Local Bankruptcy Rule 2016-2(d)(viii) (travel time limited to 50% of hourly rate); *In re Kuhn*, 337 B.R. 668, 676 (Bankr. N. D. Ind. 2006) (district policy to limit travel compensation to 50% of ordinary rate charged for legal services).

---

[9] As set forth in the spreadsheet attached as Exhibit J to the Phelps Declaration, we calculate that at Plaintiff's counsel are claiming least 65 hours purely for travel, with no indication that any work was done on the case during travel time. For the Court's convenience, where Plaintiff's counsel "block billed" travel time along with other activities (such as depositions or hearings), we have subtracted the time the other activities actually took to isolate the travel time. Thus, for example, on September 14, 2010, Mr. Lebedev ("GLL") billed 16.0 hours to attend the deposition of Chevron U.S.A. employee Richard Loyd. The deposition lasted 1.5 hours (see Phelps Decl., ¶ 3, Exh. E), so we attribute 14.50 hours to travel time.

Finally, we note that the hours billed for "travel" in many instances are simply out of line on their face. Thus, for example, after subtracting the time actually spent in hearings and depositions, Plaintiff's counsel billed:

- 14.5 hours for travel on 9/14/2010 to attend a 1.5 hour deposition in Walnut Creek (16.0 hours billed for the day)
- 8.0 hours for travel on 8/26/2010 to attend a four hour deposition in Walnut Creek (12.0 hours billed for the day)
- 7.2 hours for travel on 5/10/2011 to attend one hour Pre-Trial Conference with Court in San Francisco (8.20 hours billed for the day)

Chevron U.S.A. submits that the Court should deduct a total of **$17,622.50** from the fee application due to excessive travel time claimed by plaintiff's counsel.

e) Plaintiff's request for reimbursement of office overhead expenses should be denied.

Chevron U.S.A. submits that the Court should deduct a total of **$3,404.34** from the fee application representing charges that are essentially Plaintiff's counsel's law firm overhead. These charges include such things as messenger charges, postage, electronic legal research, and parking. The questioned charges are summarized in the spreadsheet attached as Exhibit K to the Phelps Declaration.[10]

Plaintiff's counsel have provided no evidence that such expenses are recoverable because they are the type that is routinely billed to clients in the legal market. *See Chalmers v. City of Los Angeles*, 796 F.2d 1205, 1216 n. 7 (9th Cir. 1986) (costs not normally taxable are recoverable if they would "normally be charged to a fee paying client…"). Again, much evidence is to the contrary. For example, studies reported in legal publications and the general press indicate that clients are increasingly refusing to pay for what are essentially law firm overhead expenses. *See* Phelps Decl., ¶¶ 5-6, Exhs. L and M.

---

[10] The bulk of the overhead charges consist of computerized legal research expenses ($647.09) and various charges for postage and messenger services ($1851.20). *See* Phelps Decl., ¶ 4, Exh. K.

C. Plaintiff's Request For A Multiplier Must Be Denied.

We next submit that the Court must deny Plaintiff's counsel's request for a 2X multiplier or enhancement on the lodestar. Pltf's Mem., p. 11. There is a "strong" presumption that the lodestar figure, *standing alone*, yields the presumptively the proper fee. *Perdue v. Kenny A. ex rel. Winn*, ___ U.S. ___, ___, 130 S.Ct. 1662, 1673 (2010). Under federal law, multipliers may be awarded only in "rare and exceptional cases…" *Perdue, supra. Accord: Van Gerwen v. Guarantee Mut. Life Co.*, 214 F.3d 1041, 1045 (9th Cir.2000); *Mitchell Engineering v. City and County of San Francisco, supra,* 2011 WL 1431511 at p. *6. As Justice Kennedy explained, "extraordinary cases" warranting enhancement "are presented only in the rarest of circumstances." *Perdue, supra*, 130 S.Ct. at p. 1677 (concurring opinion).

The party seeking to enhance the lodestar figure amount has the burden to prove that the lodestar figure is inadequate. *E.g., Guam Soc'y of Obstetricians & Gynecologists v. Ada*, 100 F.3d 691, 697 (9th Cir.1996). In particular, "[e]nhancements should not be awarded without specific evidence that the lodestar fee would not have been adequate to attract competent counsel." *Perdue v. Kenny A. ex rel. Winn, supra*, 130 S.Ct. at p. 1668. We note that Plaintiff's application is devoid of any proof that enhancement is required to attract competent counsel, meaning that the Court may reject the request at the outset.

Even if Plaintiff could overcome this initial failure of proof, the arguments Plaintiff makes must be rejected. Plaintiff's counsel claim that an enhancement is warranted due to "Chevron U.S.A.'s scorched earth litigation strategy, the contingent nature of the representation, the difficulty and complexity of the matters at issue and the results obtained…" Pltf's Mem., pp. 10-11.[11] For the reasons we set forth below, Plaintiff's request for a multiplier must be denied. Simply stated, this is not the "rare" or "exceptional" case where an enhancement is warranted.

/ / /

/ / /

/ / /

---

[11] Plaintiff argues that the contingency factor is the "primar[y] reason for seeking the enhancement. Pltf's Mem., p. 9:14-15.

1. Complexity of issue cannot be used to support an enhancement because that factor is subsumed in the lodestar.

Plaintiff's counsel's request for a multiplier must be denied to the extent that it is based upon the same factors underlying the "lodestar" calculation. In other words, if a factor was considered in determining the reasonableness of the rates charged and hours expended, it cannot be used again to support an enhancement. The law in this regard is settled beyond question. *See Perdue v. Kenny A. Ex Rel. Winn, supra,* 130 S.Ct. at p. 1673 ("an enhancement may not be awarded based on a factor that is subsumed in the lodestar calculation"); *City of Burlington v. Dague, supra,* 505 U.S. at p. 562-563 (using lodestar factor to support enhancement "amounts to double counting"); *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, supra,* 483 U.S. at pp. 726-727 (counting lodestar factors toward enhancement would result in "windfall"); *Mitchell Engineering v. City and County of San Francisco, supra,* 2011 WL 1431511 at p. 6 (novelty and complexity of case may not be used as ground for enhancement).

Here, the "difficulty and complexity" of the case as well as the "result obtained" are factors already subsumed in the initial lodestar calculation. *See* Pltf's Mem., pp. 8 ("novelty and difficulty of the questions") and 9 (Amount involved and the results obtained). As a matter of law, they cannot be used to justify any enhancement. *See Blum v. Stenson, supra,* 465 U.S. at pp. 898-899 ("Neither complexity nor novelty of the issues, therefore, is an appropriate factor in determining whether to increase the basic fee award").

2. "Results obtained" cannot support an enhancement.

Even if the Court considers the "results obtained" factor, Plaintiff has not established the need for a multiplier. Merely prevailing at trial does not, standing alone, warrant an enhancement. As the Supreme Court explained in *Perdue*:

> "When a plaintiff's attorney achieves results that are more favorable than would have been predicted based on the governing law and the available evidence, the outcome may be attributable to superior performance and commitment of resources by plaintiff's counsel. Or the outcome may result from inferior performance by defense counsel, unanticipated defense concessions, unexpectedly favorable rulings by the court, an unexpectedly sympathetic jury, or simple luck.

130 S.Ct. at p. 1674. Accordingly, for the results of the case to warrant an enhancement, "superior results are relevant only to the extent it can be shown that they are the result of superior attorney performance." *Id.*

Plaintiff's counsel simply have made no such showing of a causal link between "superior attorney performance" and the result obtained. Nor could they, since the jury's award was substantially below the amount that Plaintiff's counsel urged them to give Plaintiff.[12]

3. Enhancement based on the contingent nature of the relationship between Plaintiff and its counsel is expressly forbidden by federal law.

Plaintiff's counsel argue that the contingent nature of their relationship with Transbay is the "primar[y]" reason they seek an enhancement. Pltf's Mem., p. 9:14-15. But this approached is plainly barred. *City of Burlington v. Dague*, *supra*, is directly on point and prohibits such an enhancement:

> "We hold that enhancement for contingency **is not permitted** under the fee-shifting statutes at issue."

505 U.S. at p. 567 (emphasis added). While *Dague* did not arise under the PMPA, as noted above, the *Dague* Court made clear that rules regarding what constitutes a reasonable fee—which is of course the ultimate question here—apply "uniformly to all" federal fee-shifting laws. *Id.* at p. 562.

4. No evidence supports that Chevron U.S.A. employed "scorched earth tactics," or that Chevron U.S.A.'s conduct in any way supports an enhancement.

Finally, the Court should reject Plaintiff's *ipse dixit* argument that an enhancement is warranted due to alleged "scorched earth" litigation tactics employed by Chevron U.S.A.. To begin, if the case were hard fought, that fact would be reflected in the number of hours expended in prosecuting the case. In other words, it would be reflected in the lodestar itself. Here, Plaintiff's counsel offers the Court no proof that this case "includes an extraordinary outlay of

[12] In closing, Mr. Rees asked the jury to award between $795,000 and $1,212,000. The jury's ultimate award was $495,000 (*see* Dkt No. 131), or roughly 60% of the lowest figure Plaintiff requested.

expenses" or that the litigation was "exceptionally protracted." *Perdue*, *supra*, 130 S.Ct. at p. 1674. Again, the request fails at the threshold.

Beyond the failure of proof, however, Plaintiff's counsel's assertion that Chevron U.S.A. employed "scorched earth" tactics is simply wrong. This was a relatively simple matter. At Chevron U.S.A.'s suggestion, the parties entered into extensive stipulations of fact that were used at trial. *See* Dkt No. 73, pp. 5-7. Pre-trial, Chevron U.S.A. took only three depositions and Plaintiff took two.[13] Phelps Decl., ¶ 8. Each person who was deposed testified at trial. *Id.* The longest deposition in the case was taken by Plaintiff's counsel. It lasted 4 hours, well short of the presumptive time limit. *Id.* Chevron U.S.A. and Plaintiff both issued document subpoenas to third parties. *Id.* Chevron U.S.A.'s deposition of Mr. Tsachres (Plaintiff's principal, and main witness) lasted less than two and a half hours. *Id.* No discovery disputes were brought to the Court for resolution. *Id.* The only motion brought by Chevron U.S.A. was a straightforward summary judgment motion. *See* Dkt No. 40. In short, by no means did Chevron U.S.A. employ a scorched earth defense.

D. Plaintiff's Request for Enhanced Pre-Judgment Interest Should Be Denied.

Finally, the Court should reject Plaintiff's request that the Court ignore the federal standards for awarding interest (28 U.S.C. § 1961) in favor of a higher rate under California law. Plaintiff offers no authority for this request, other than its complaint that T-Bill interest rates have been low in recent years. Plaintiff's argument should be rejected for several reasons, as we discuss next.

1. Federal law governs award of interest in federal question cases.

While Plaintiff now characterizes this as a simple "contract dispute" (Pltf's mem., p. 8:5), in fact it involved a pure question of federal law. Plaintiff's First Amended Complaint asserts that the claim was based on a federal question. See Dkt No. 5, ¶ 9 ("Jurisdiction over this action is therefore appropriate since this case involves a Federal Question…"). In federal question cases, typically the federal interest rate applies and not any state rate. *See Oak Harbor Freight Lines, Inc. v. Sears Roebuck & Co.*, 513 F.3d 949, 961 (9th Cir. 2008).

---

[13] Chevron U.S.A. deposed Mr. Tsachres and Plaintiff's two experts (Messrs. Plaine and Junius). Plaintiff deposed two Chevron U.S.A. employees (Messrs. Vaughn and Loyd), both of whom testified at trial. Phelps Decl., ¶ 8.

2. Basing interest rates on state law rules thwarts the PMPA's goal of national uniformity.

Plaintiff's request is also contrary to the PMPA's goal of providing national uniformity of rules for termination and non-renewal of petroleum franchises. *Atlantic Richfield Co. v. Herbert (In re Herbert)*, 806 F.2d 889, 892 (9th Cir.1986) ("In enacting the PMPA, Congress attempted to provide national uniformity of petroleum franchise termination law."). If this Court were to engraft a state-law pre-judgment interest remedy onto this pure PMPA action, then the goal of uniformity would be thwarted: It would make the franchisor's liability dependent on state law, which could vary from jurisdiction to jurisdiction.

Once again, the Court should also look with great skepticism at Plaintiff's claim that "[t]his action is primarily a contract dispute…" Pltf's Mem., p. 11:5. When Plaintiff wanted to justify its billing rates, it argued that the PMPA was a complex and novel law requiring special expertise to understand litigate. *See* Pltf's Mem., p. 8:15-18. To justify the pre-judgment interest award, Plaintiff contends only 5 pages later that the case was really a simple contract case. Plaintiff cannot have it both ways.

3. The jury rejected Plaintiff's claim that it was harmed by alleged "excess" interest payments on his loan.

Finally, we also object and urge the Court to summarily reject Plaintiff's claim that it needs additional compensation by way of a higher interest rate because Mr. Tsachres endured financial hardship in purchasing the property. Plaintiff made that argument to the jury and the jury rejected it. Plaintiff offers no rationale for the Court ignoring that part of the jury verdict.[14]

[14] Plaintiff's reference to hardship on Mr. Tsachres' family (Pltf's Mem., p. 12:6-7) is without any evidentiary support, as the Court sustained Chevron U.S.A.'s objection to Mr. Tsachres' testimony in this regard. It is also devoid of legal support, in that Plaintiff provides the Court nothing saying that Mr. Tsachres' family circumstances can warrant a higher interest rate.

III. CONCLUSION.

For the foregoing reasons, Chevron U.S.A. respectfully submits that Plaintiff's motions should be denied.

Dated: December 12, 2012

GLYNN & FINLEY, LLP
ROBERT C. PHELPS

By /s/ Robert C. Phelps
Robert C. Phelps

Attorneys for Defendant
Chevron U.S.A. Inc.